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No. 03-752

Supreme Court, U.S.
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In The

Supreme Court of the United States

MILTON SONNEBERG,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR REHEARING

MILTON SONNEBERG
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I. WILL THE UNITED STATES SUPREME COURT COUNTENANCE THE DIRECT DEFIANCE OF ITS AUTHORITY BY THE GOVERNMENT AND THE COURTS BELOW?

A. Following the Government's Lead, The District Court Directly Defied the *Neder* Court's Instructions on the Scope of the Mail and Wire Fraud Statutes

On January 12, 2004, the Supreme Court denied Milton Sonneberg's ("Petitioner") petition for a writ of certiorari (Docket #03-752). In so doing, for the first time in available records, it sent the chilling message that lower courts may with impunity directly defy the express prior written opinion of the United States Supreme Court. The executive branch's deliberate disregard of the instructions in *Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827, 144 L. Ed. 2d 35 (1999) coupled with the lower courts' post–*Neder* decisions undermines the Constitutional system of checks and balances. The direct defiance of *Neder's* instructions overthrows the hallowed principle of *stare decisis*.

On March 1, 2000, Petitioner filed a 28 U.S.C. § 2255 Motion for collateral relief with the United States District Court for the District of New Jersey that had presided over Petitioner's conviction for conspiracy, mail and wire fraud, and interstate transportation of property obtained through fraud. The essence of the charges and the government's theory of prosecution was that Petitioner was guilty of fraudulent nondisclosures, primarily regarding a 1989 securities matter for which Petitioner, after six years, had not yet even been sentenced. Moreover, pursuant to the ruling ultimately made by the district court involved, the offense conduct that was undisclosed was literally "victimless" and Petitioner's role was in fact very minor.

The New Jersey conviction rested on the government's position, wholly adopted by the district court, that the mail and wire fraud statutes sweep more broadly than common law fraud. Therefore, went the theory, even absent a duty to disclose because no fiduciary or other trust relationship could be attributed to Petitioner, Petitioner was nonetheless guilty of fraud simply because he failed to disclose such information. Over Petitioner's objection Petitioner grounded on the well-established common law principle that one commits fraud by failing to disclose only when (s)he is under a duty to do so (*Chiarella v. United States*, 445 U.S. 222, 227-28, 100 S.Ct. 1108, 63 L. Ed. 2d 348 (1980)), the district court still insisted on instructing the jury that Petitioner's mere silence constituted grounds for conviction. On May 29, 1997, following the district court's instructions, not surprisingly the jury entered a general verdict of guilty.

Petitioner's § 2255 motion relied on the intervening decision of the Supreme Court in *Neder* which, in holding that materiality is an element of the mail and wire fraud statutes, explicitly instructed **courts** they **must presume** that when Congress enacted those statutes it intended for the settled meaning of the common law term "defraud" to apply. Despite Petitioner's citation thereto, nearly two years subsequent to the *Neder* opinion, denying Petitioner's 28 U.S.C. § 2255 Motion, the district court's letter opinion, *verbatim repeating the government's September, 2000 reply brief,* directly defied the Supreme Court, as follows:

Neder June 10, 1999	U.S.D.C. – April 6, 2001
The Government relies heavily on *Durland v. United States*, 161 U.S. 306 (1896), our first decision construing the mail fraud statute, to support its argument that the fraud statutes sweep more broadly than common-law fraud . . . Although *Durland* held that the mail fraud statute reaches conduct that would not have constituted "false pretenses" at common law, it did not hold, as the Government argues, that the statute encompasses more than common-law fraud.	As [the government] correctly points out, the mail and wire fraud statutes are not limited to matters which would be punishable as common law fraud. *See Durland v. United States*, 161 U.S. 306, 313-14 (1896) . . .

B. By Concurring With The Government's Deliberate Misstatement Of The Date Of The *Neder* Decision, The Court Of Appeals Fundamentally Erred On Whether *Neder* Constitutes An Intervening Change In The Law

Verifiably, the following is an exact copy of the heading of the *Neder* decision:

NEDER *v.* UNITED STATES

Certiorari To The United States Court Of Appeals For The Eleventh Circuit

No. 97-1985. Argued February 23, 1999 – Decided June 10, 1999

Beyond its endorsement of the district court's defiance of the Supreme Court, and despite Petitioner's spotlighting of the government's misstatement of the *Neder* decision's date, the United States Court of Appeals for the Third Circuit adopted in whole the government's misrepresentation of the date. Specifically, it held: "*In fact*, **Neder** *was decided on February 23, 1999* (emphasis added), and the [Supreme] Court denied his petition March 5, 1999, ...[therefore] the **Neder** decision was not 'intervening'."

Plainly, contrary to the Third Circuit and the government, **the date wrongfully adopted from the government's brief was the date of oral argument in *Neder*, not the date *Neder* was decided.** Since March 5, 1999 ineluctably precedes June 10, 1999, it is incontrovertible that *Neder* was indeed intervening. The Third Circuit could not have had it more wrong.

C. Denial Of The Petition Ratifies A Gross Miscarriage Of Justice And Enshrines Lasting Public Disrespect For This Court's Supremacy As The Highest Court In The Land

The Third Circuit established a limitless scope for prosecution under the Federal fraud statutes. Its holding is inconsistent with the holdings of this Court and other circuit courts. This combination of egregious errors directly

deprived Petitioner of his constitutional right to a fair trial as well as objective appellate review. The record facts and the law supporting Petitioner's arguments on this issue are found in his petition for a writ of certiorari.

Despite having been convicted for conduct that this Honorable Court has otherwise determined is not criminal, Petitioner has already served a prison sentence of nearly six years plus a year of supervised release. Petitioner remains under the supervision of the United States Probation Office. Under the terms of his sentence, Petitioner is subject to that status for an additional four years. Only a rehearing stands between the permanent, public enshrinement of the acceptability of direct defiance of this Court by the government and the courts below, not to mention the perpetuation of a gross miscarriage of justice in the ongoing violation of Petitioner's constitutional rights.

Dated: February 3, 2004

Respectfully submitted,

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CERTIFICATION

I, Milton Sonneberg, Petitioner, *pro se*, hereby certify in good faith that due to a unique circumstance a rehearing by this Honorable Court is warranted for my petition for a writ of certiorari. It took the denial of the petition for this singularly historic circumstance to unfold. The substantial ground not previously presented is that for the first time on the available record this Honorable Court's failure to grant the writ must inevitably result in the public enshrinement of direct defiance by courts below of the express written authority of this Court. This Court, by failing to grant certiorari here, ratifies the wholesale flouting by the courts below and the federal government of this Court's supremacy as the final word on questions of statutory construction. Commensurately, tolerance of the defiance of this Court's instructions by the government and the courts below in this matter foreshadows a collapse of the entire constitutional system of checks and balances along with the sacred judicial principle of *stare decisis*.

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